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Insight and Outlook . . . By Joseph Kraft

The Wiretapping Argument

AT FIRST GLANCE, the argument between J. Edgar Hoover and Robert Kennedy on wiretapping looks like a direct confrontation where somebody has to be lying.

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But my impression is of a far more ambiguous condition, generated by an unresolved conflict in public opinion, and given increase by legal inconsistencies, official traditions of self-deception and personal antipathies.

The public, as a whole, has no clear attitude on the issue of electronic eavesdropping. While a small minority may feel intensely that the use of bugs is a serious violation of personal liberty, most people do not object strongly to the use of such devices as a part of the defense of national security or the fight against crime.

Public permissiveness finds expression in a legal loophole. Wiretapping is banned by section 605 of the Communications Act of 1934. In the Nardone Case of 1937, the Supreme Court laid down the doctrine that evidence obtained by Federal officials through wiretaps could not be used in Federal courts.

But in the Olmstead Case of 1928, and repeatedly since then, the Supreme Court has refused to bring electronic eavesdropping under the Fourth Amendment ban against "unreasonable search and seizure." And this reluctance has led to the doctrine, laid down by Attorney General Robert Jackson in 1941, that official use of electronic devices is all right so long as the information obtained is not made public, in court or anywhere else.

UNDER THE JACKSON doctrine there has grown up an extraordinary practice of bureaucratic self-deception. Police authorities use electronic bugging devices on a massive scale, confident that if criminals are apprehended, there will be general public approval as well as commendation from superior political officials. But they keep the practice covert, so as not to embarrass political superiors.

In the case of Hoover and Sen. Kennedy that tradition seems to have been deepened by a competitive zeal growing out of Kennedy's long concern with the problem of organized crime. Apparently, the Federal Bureau of Investigation had not in 1961 penetrated the strongholds of organized crime as it had long since penetrated the Communist Party. When pressure for action on organized crime developed, the Bureau evidently resorted to eavesdropping.

That would explain why there was an increase in bugging by the FBI after Kennedy became Attorney General in 1961. It would, also, explain why Hoover is so confident that Kennedy had to know the bugging was being done.

But just as the FBI was especially eager to succeed with the new Attorney General back in 1961, so it was terribly keen not to embarrass him with any blatant unpleasantness. Thus the liaison man between the Bureau and the Attorney General was an agent very friendly to Kennedy and prone to spare him trouble about such dirty business as wiretapping.

APPARENTLY the direct transcripts of the wiretaps were held within the Bureau itself. Reports of the transcripts sent to the Justice Department often referred to electronic devices in ways that made them seem like informers.

As one former Justice Department official put it recently: "The FBI did everything it could to make it seem that the wiretaps were informers. They almost put arms and legs and names on the bugs."

That kind of practice would explain why Kennedy is so confident in declaring that he never authorized any further bugging. It explains why the evidence so far adduced to demonstrate Kennedy's knowledge of bugging practices is so small in volume and so indirect.

In sum, both parties to the so-called confrontation may, in one sense, be right—Hoover in believing that he had authority for more bugging; Kennedy in believing that he had given no such authority.

But it is also clear that in another sense, they were wrong. Both seem to have been insufficiently sensitive to the issue of private rights. That is not exactly a capital crime, and it seems to me that each man might well have been mistaken in the past.